

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHN LEE FOX,

Plaintiff,

v.

TY TRENARY,

Defendant.

Case No. C15-388 RSL-BAT

**REPORT AND  
RECOMMENDATION**

In this 42 U.S.C. § 1983 civil-rights action, Plaintiff John Lee Fox, proceeding pro se and *in forma pauperis*, sues Ty Trenary, Sheriff of the Snohomish County Jail (SCJ). Defendant Trenary moves for dismissal of the complaint as Mr. Fox has made no claim that Sheriff Trenary personally participated in any alleged violation of his constitutional rights. Dkt. 24. The Court recommends that Defendant's motion be granted and this matter be dismissed with prejudice.

**STATEMENT OF MATERIAL FACTS**

Mr. Fox alleges in his complaint:

Prior to my arrival at SCJ the Public Defender warranted that SCJ would make allowance for my macrobiotic diet and assured me that I would receive my MD prescribed medication. Since I have been here I have received NO sustenance [sic] of any kind that was edible. I am lactose intollerant [sic] (so I can't eat milk, cheese etc.) I am allergic to peanuts and cannot digest potatoes, white flour products as they impact by bowels and I just recently in January had a right

1 inguinal hernia operation. I am also a vegetarian that does not eat sugar, syrup or  
 2 other preservative-ridden products. As of today, my (12th) twelfth [sic] day of  
 3 incarceration, I have received no sustenance – and is the reason that this diatribe  
 4 is barely cogent. Also when I arrived SCJ medical refused to give me Tramadol  
 5 pain medication even though I brought the Rx in with me. Then SCJ decided to  
 6 give me tramadol after talking to one of there [sic] glorified nurses and I received  
 7 it for 7 days when it was terminated and I still am without medication. Yesterday I  
 8 petitioned [sic] SCJ to have my Tramadol taken from my property and delivered to  
 9 the SCJ medical so that I could receive my MD prescribed tramadol mediation.  
 10 Also an unknown sgt. Here threatened me [illegible] an infraction (a threat) if I  
 11 persisted in sending appropriate [illegible] kites to appropriate parts, (medical)  
 12 As of 3-10-15 I have received no edible food for 15 days and improper  
 13 medication, Even though the SCJ had copies of all my prescribed medication.

14 Dkt. 20, p. 3. Mr. Fox seeks \$10 million in damages, immediate release from jail, and the  
 15 criminal prosecution and/or termination of unidentified “medical techs and others.” *Id.*, p. 4.

16 Mr. Fox was released from the SCJ on March 20, 2015. Dkt. 5. Mr. Fox was  
 17 incarcerated at the Snohomish County Jail (SCJ) for approximately twenty days and filed this  
 18 suit prior to his release. Dkt. 1. His release from prison moots any claim for injunctive relief.  
 19 *Cano v. Taylor*, 739 F.3d 1214, 17 (9<sup>th</sup> Cir. 2014). Additionally, because Mr. Fox was a prisoner  
 20 at the time he filed this lawsuit, he was required to exhaust his administrative remedies prior to  
 21 filing this lawsuit. 42 U.S.C. § 1997e ( “[n]o action shall be brought with respect to prison  
 22 conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in  
 23 any jail, prison, or other correctional facility until such administrative remedies as are available  
 are exhausted.”) There is no evidence that he has done so.

Mr. Fox states he did not file a grievance at the SCJ because there is no grievance  
 procedure at the SCJ. Dkt. 20, p. 2. However, summary judgment evidence shows that a  
 grievance procedure did exist and that Mr. Fox would have been aware of its existence.

Documents attached to Mr. Fox’s response indicate that he submitted multiple kites  
 directed to the sergeant and sheriff relating to his complaints of inedible meals and receiving his

1 prescribed medication. Dkt. 27, pp. 15-24. On at least one occasion, Mr. Fox was advised to  
2 send a kite to medical for further evaluation of his medical and/or dietary needs. *Id.*, p. 15.  
3 There is no evidence that he followed this recommendation. There is one kite addressed to  
4 medical services but in it, Mr. Fox merely complained about his breakfast. He was advised that  
5 “medical does not make diets.” Mr. Fox also sent a kite to food services but was advised that the  
6 kitchen cannot approve medical diet changes. Dkt. 27, pp. 21, 24. Although Mr. Fox sent many  
7 kites and complained that for medical or other reasons, he was unable to consume the food  
8 provided to him, there is no evidence that he requested (or was denied) a medical evaluation so  
9 that legitimate dietary needs could be addressed.

10 Responses to Mr. Fox’s kites also indicate that he was receiving Tramadol and a  
11 vegetarian diet as requested. *Id.*, pp. 16, 19. Another response advised him to file a grievance.  
12 *Id.*, p. 20. He did not do so. In a kite dated March 15, 2015, Mr. Fox stated “I have copied you  
13 on many of my kites – are you getting my kites or are they being intercepted?” He was advised  
14 “All kites are forwarded.” *Id.*, p. 16.

15 According to Captain Daniel Stites, a supervisor at the SCJ, an inmate may submit a  
16 written “kite” requesting medical or other services. Kites are answered by the module deputy or  
17 routed to the appropriate person. Medical kites concerning inmate medical issues are placed in a  
18 separate locked box to be reviewed by staff from the SCJ medical unit for appropriate action and  
19 are in the inmate’s medical records. Dkt. 29, Declaration of Daniel Stites, pp. 1-2. Kites are not  
20 forwarded to Sheriff Trenary even if the kites are addressed to him. The sheriff has no  
21 knowledge of the existence of individual kites and no role in addressing concerns raised by  
22 inmate kites, as those responsibilities are delegated to others within SCJ. *Id.*

23 If an inmate has complaints about facility conditions or actions by staff members which

1 the inmate has been unable to resolve informally with staff, the inmate may file a written  
2 grievance on a form provided by SCJ. The grievance goes to a first line supervisor for a decision  
3 and an inmate may appeal that decision to either a major or the Bureau Chief of SCJ. The  
4 decision by either a major or the Bureau Chief is a final decision. Grievances are not forwarded  
5 to Sheriff Trenary and the Sheriff has no role in addressing concerns raised by inmate  
6 grievances. Dkt. 29, Stites Decl., p. 3.

7 The kite procedure, information regarding meals, and grievance procedures are all  
8 explained in the SCJ's Inmate Orientation Handbook ("Handbook"), which is given to each  
9 inmate at booking. Each inmate must acknowledge receipt of the Handbook and that they have  
10 read it. Dkt. 29, Stites Declaration, p. 2 and Exhibit A.

11 Mr. Fox's complaint makes no mention of Sheriff Trenary (other than to include him as a  
12 defendant). Dkt. 20. In his declaration, Sheriff Trenary states that he has no personal knowledge  
13 of the events described in Mr. Fox's complaint. Dkt. 25, Declaration of Ty Trenary, ¶ 2.

#### 14 DISCUSSION

15 The Court shall grant summary judgment if the movant shows that there is no genuine  
16 dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Fed. R.  
17 Civ. P. 56(a). The moving party has the initial burden of production to demonstrate the absence  
18 of any genuine issue of material fact. Fed. R. Civ. P. 56(a); *see Devereaux v. Abbey*, 263 F.3d  
19 1070, 1076 (9<sup>th</sup> Cir. 2001) (en banc). "If the moving party shows the absence of a genuine issue  
20 of material fact, the non-moving party must go beyond the pleadings and 'set forth specific facts'  
21 that show a genuine issue for trial." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9<sup>th</sup> Cir.  
22 2002) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The non-moving party  
23 may not rely upon mere allegations or denials in the pleadings but must set forth specific facts

1 showing that there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
2 242, 249 (1986). While the Court may not grant a motion for summary judgment simply  
3 because the nonmoving party failed to respond, it may grant the motion on the merits “on any  
4 ground supported by the record.” *See Heinemann v. Satterburg*, 731 F.3d 914 (9th Cir. 2013).

5 To obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that  
6 the particular defendant has caused or personally participated in causing the deprivation of a  
7 particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981);  
8 *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). Sweeping conclusory allegations  
9 against an official are insufficient to state a claim for relief. The plaintiff must set forth specific  
10 facts showing a causal connection between each defendant’s actions and the harm allegedly  
11 suffered by plaintiff. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

12 Defendants in a 42 U.S.C. § 1983 action cannot be held liable based on a theory of  
13 respondeat superior or vicarious liability. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981);  
14 *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986). To state a claim for relief  
15 under § 1983 based on a theory of supervisory liability, a plaintiff must allege some facts that  
16 would support a claim that the supervisory defendants either personally participated in the  
17 alleged deprivation of constitutional rights, knew of the violations and failed to act to prevent  
18 them, or promulgated or “implement[ed] a policy so deficient that the policy itself is a  
19 repudiation of constitutional rights and is the moving force of the constitutional violation.”  
20 *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations and quotation marks  
21 omitted).

22 Mr. Fox has failed to allege facts to support a claim against Sheriff Trenary. Mr. Fox  
23 contends that Defendant Trenary was made aware of his medical and dietary needs prior to his

1 incarceration because Mr. Fox's attorney told him that she had received assurances from  
2 "Defendant and his staff to that effect." *Id.*, p. 4. However, this unsworn hearsay evidence is not  
3 competent summary judgment proof nor is it proof that Sheriff Trenary was aware of and was  
4 deliberately indifferent to any serious medical needs of Mr. Fox. As previously noted, Sheriff  
5 Trenary swears that he had no knowledge of Mr. Fox's complaints. Dkt. 25, Trenary Decl., p. 1.

6 In his sworn declaration, Captain Daniel Stites, states that kites and grievances are not  
7 forwarded to Sheriff Trenary even if the kites are addressed to the sheriff because the  
8 responsibility of addressing concerns raised in inmate kites have been delegated to others. Dkt.  
9 29, pp. 2-3. Moreover, the record indicates that Mr. Fox, along with all other inmates, would  
10 have received an orientation handbook when he was booked into the SCJ explaining the kite and  
11 grievance procedures. *Id.*, p. 3. Mr. Fox provides no competent summary judgment evidence to  
12 the contrary and his contention that there is no grievance procedure at the SCJ is not tenable.

13 Mr. Fox complains that he did not receive the motion for summary judgment in a timely  
14 manner and accuses Defendant's counsel of acting in bad faith, attempting to perpetrate a fraud  
15 on the court, and having actively suborned perjury in a previous unidentified action. Dkt. 27, p.  
16 1. He provides no proof for these very serious allegations. He also claims he needs time for  
17 discovery to oppose Defendant's motion for summary judgment, but provides no affidavit or  
18 declaration setting out specific facts he hopes to discover if granted a continuance that will raise  
19 a genuine issue of material fact.

20 Mr. Fox also states that he needs to amend his complaint, but he has not previously  
21 motioned the court to do so. Additionally, he identifies only additional causes of action he  
22 wishes to plead and not any additional defendants whom he wishes to join. Dkt. 27, pp. 2-3.  
23 Thus, allowing Mr. Fox to amend his Complaint will not cure the deficiency identified in

1 Defendant Trenary's motion for summary judgment, i.e., that Mr. Fox has named a sole  
2 defendant who is not liable under a § 1983 claim based upon a theory of either direct liability –  
3 i.e., that Sheriff Trenary personally participated in any constitutional violation – or supervisory  
4 liability – i.e., that Sheriff Trenary promulgated a policy that is so deficient that the policy itself  
5 is a repudiation of constitutional rights and is the moving force of any constitutional violation.  
6 Accordingly, Defendant Trenary is entitled to summary judgment.

### 7 CONCLUSION

8 The Court recommends that Defendant's motion for summary judgment (Dkt. 24) be  
9 **GRANTED** and Plaintiff's complaint be **DISMISSED WITH PREJUDICE**.

10 Any objections to this Recommendation must be filed and served upon all parties no later  
11 than **Wednesday, January 20, 2016**. The Clerk should note the matter for **Friday, January 22,**  
12 **2016**, as ready for the District Judge's consideration if no objection is filed. If objections are  
13 filed, any response is due within 14 days after being served with the objections. A party filing an  
14 objection must note the matter for the Court's consideration 14 days from the date the objection  
15 is filed and served. The matter will then be ready for the Court's consideration on the date the  
16 response is due. Objections and responses shall not exceed twelve (12) pages. The failure to  
17 timely object may affect the right to appeal.

18 DATED this 30th day of December, 2015.

19 

20 BRIAN A. TSUCHIDA  
21 United States Magistrate Judge  
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